



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 117 OF 2015**

**MARTIN MARIT EPAKAN-----APPELLANT**

**VERSUS**

**REPUBLIC-----RESPONDENT**

**JUDGEMENT**

The appellant was charged on count I with the offence of robbery with violence contrary to section 296(2) of the Penal code. The particulars of the offence were that on 31/5/2014 at LMD area in Isiolo County within Eastern region, jointly, while armed with a dangerous weapon namely a rifle and a sword, robbed one John Louokot Ayangai of National Identity Card, ATM card of Co-operative Bank, Military Identity Card, ATM card of Co-operative Bank, Military Identity card, ATM card of Co-operative Bank, Military Identity card, a Knapsack sprayer, a water pump and cash Ksh 17,000 all valued at Ksh 83,000/=

On Count II the appellant was charged with the offence of House breaking contrary to section 304(1) and stealing contrary to section 279(b) of the Penal Code. The particulars of the offence are that on 16/10/2014 at LMD area in Isiolo County within Eastern region, broke and entered the building used as a dwelling house by Halima Osman with an intent to steal and did steal cash Ksh 35,000/= the property of Halima Osman.

The appellant faced an alternative count of handling stolen property contrary to section 322(1) (2) of the Penal Code. The particulars are that on 19/10/2014 at Soko ya Miraa in Isiolo County within Eastern region, otherwise than in the course of stealing dishonestly had in his possession a KDF Identity card of John Loyokot Ayangai, service No. 105634, and his Co-operative Bank ATM Card Account No. [...] knowingly and having reason to believe them to be stolen properties.

The trial Court Convicted the Appellant in respect of Count 1 and sentenced him to death. The Appellant appealed against the conviction and sentence on the following grounds.

- 1. That the learned trial Magistrate erred in both law and fact by failing to note that all the exhibits were not produced.***
- 2. That the learned trial Magistrate erred in law and fact by failing to note that the Accused was arrested due to mere suspicion.***
- 3. The learned trial Magistrate erred in law and fact by failing to note that there were irregularities, inconsistencies, contradictions and discrepancies in the evidence tendered by the prosecution witnesses.***

**4. The learned trial Magistrate failed to note that the quality, the nature, the size and the position of light was not determined.**

**5. The learned trial Magistrate failed to note that the exhibit which was produced in the Trial court was not found in the possession of the accused.**

**6. The learned Trial Magistrate failed to note that the evidence tendered by the prosecution witness was contradicting, uncollaborating and inconsistent.**

The Appellant in his written submissions submitted that nothing was recovered from him in respect of the Complainant's stolen property. He submitted that the Police did not search his dwellings to recover the stolen property. The prosecution did not prove that exhibits 1 and 2, the Military Identity Card and the Co-operative Bank ATM card were recovered from the appellant. He further submitted that among the items listed by the Complainant as having been stolen which include, a water pump, a bag which had his item ATM card and employment card, only the ATM card and the employment card were recovered.

The appellant submitted that he was arrested on mere suspicion. The Complainant and his wife PW2 did not correctly identify/recognize the appellant as the attacker because the offence was committed at night and there was no light in the house.

It is further submitted that the evidence tendered before the trial court was inconsistent, uncollaborating and contradicting therefore making the whole trial null and void. The Complainant stated that he and his family arrived home from Isiolo at about midnight when the robbers being aware of his arrival immediately attacked him. PW2 stated in her evidence that the attackers arrived at 3am which she verified from her phone. The appellant submitted that the discrepancy about time was not due to how different people perceive the event but rather it was because the said event did not occur as it is alleged and therefore the prosecution should not have relied on such testimonies to secure a conviction against the appellant because such testimonies made the whole trial null and void.

The state opposed the appeal. Mr. Odhiambo submitted that the evidence is clear, PW1 lost his items, money and ATM card. When the Appellant was arrested he was found with PW1's ATM Card and Military card, the ATM card had PW1'S name and the Military Card had PW1's picture. The Appellant was searched and found with these items. During the attack the robbers were armed and forced PW2 to give him money. Therefore the charge for robbery with violence was proved.

This is a first appeal and the court has to evaluate the evidence afresh and make its own decision. PW1 JOHN LOYOKOT AYANGAI is an air Traffic controller of the Kenya Air Force. He testified that on 31/5/2014 at about midnight he arrived at his home in LMD, Isiolo with his wife and two children. That night they were attacked by two men who were armed with firearms. The attackers ransacked their home and took away a water pump a spray pump, a porch that had Kshs 17,000/=, PW1's ATM card and job card. He reported the matter to the Community Policing who were not able to trace the robbers and hence he decided to report at Isiolo Police Station.

On 18/10/2014 he was called by one PC KORIR who informed him that someone had been found with his job card and ATM card. He went to the station and was shown the person who was found with the documents and he identified his ATM card and Job card. The appellant fitted the description he had given to the police of the robbers. PW1 further testified that the Appellant had previously been suspected of stealing wood from his farm.

PW2 Phoebe Akolo Opiyi testified that she is a farmer and stays at LMD when at about 3:00am when with her husband Pw1 they were attacked by two people. One was armed with a firearm while the other was armed with a sword. The men asked them who they were and they told them they were the owners of that parcel of land. The robbers then said that it was them that they were looking for and ordered them to lie down. They demanded to know the whereabouts of her husband claiming that he was in Somalia and she told them that the person she was with was her husband. The attackers went into the tent and removed the water pump, spray pump and some food stuff. The men then went to the tent where the children were

sleeping and placed a gun on one of the children's head and demanded for money, PW2 told them there was money in one of the bags Kshs 17,000/= which they took together with the co-operative Bank ATM and Military I.D Card.

PW2 testified that the two people were male; they were tall and were wearing dark clothes. The following morning they reported the incident to the community policing and thereafter at Isiolo Police station. On 20/10/2014 Halima Osman called PW2 and informed her that MARIT had been arrested and her husband's I.D card found in his pocket. The next morning she went to the station and recorded her statement. She identified the job I.D card and ATM card which were produced in court as exhibits belonging to her husband after being recovered from the appellant.

PW2 further testified that the appellant matched the people who robbed them and could also recognize his voice.

PW3 FATUMA MOHAMED testified that she is a housewife and lives in Tuluroba. On 16/10/2014 at about 10:00am she left her home and was headed to LMD area. She passed through Halima Osman's house. When at the gate she saw a man holding a pliers and a hammer. The man was wearing a marvin with rasta and black jeans trouser. She did not ask him what he was doing as she thought he had been given work. The man had rastas on his head. In the evening Halima informed her that her house had been broken into and cash Ksh 35,000/= stolen. PW3 told her that she had seen someone near her gate and gave her the man's descriptions and told her that she could identify him. On 19/10/2014 Halima informed her that the man had been arrested and asked her to go and identify him. PW3 went to Isiolo Police Station and was able to identify the appellant as the man she had seen at HALIMA'S gate. She had also seen him earlier as he was a neighbour to HALIMA.

PW4, HALIMA OSMAN is a business lady and stays at Hola Odha. On 16/10/2014 at about 9:00am she left her house and went to pay the water bill. Thereafter she went to her mother's house in LMD. On her way she met with the appellant. At around 10:00am her aunt passed by her home and heard some knocks. When she knocked at the gate someone appeared. He had rastas and he told her that PW4 was not at home and she had gone to her mother's house. The man had a hammer and pliers.

When her children came home from school at 12:00pm they found the padlock to the house had been removed and went to inform their neighbor. PW4 came home and found everything scattered on the floor and Kshs 35,000/= missing. She reported the matter at the AP post. She informed her husband and her aunt. Her aunt informed her of the person she had seen at her house wearing a black T-shirt, dark jeans and a Rastafaria cap. Upon being given the man's description she remembered a neighbor at her mother's home who had a record of breaking into people's houses. She mobilized young people to look for him. On 19/10/2014 she was informed that he had been seen in Isiolo and together with AP Officers from Central AP camp went and arrested him. Her aunt came and identified him as the man she had spotted at her plot.

She then recorded her statement. She identified the appellant as the man arrested at a bar in Isiolo. She testified that she knew him well as he was a neighbor at her mother's home and had a record of breaking into people's homes.

PW5 APC DOUGLAS KORORE OTUNDO, was attached at Isiolo River AP post. He testified that various reports had been made against one Martin Epakan alias longor and they were looking for him. On 6/10/2014 at about 1.30pm one JOHN LOYOKOT reported that Martin Epakan was stealing timber from his compound. One SIMON KINGI who had been hired to transport the timber was arrested but MARTIN EPAKAN disappeared. On 16/10/2014 HALIMA OSMAN made a report that her house had been broken into and some money stolen. The following day Halima came back and reported that someone had been seen in her compound and that it was longur.

On 19/10/2014 HALIMA reported that longur had been spotted near the Miraa market and AP Officers were called to arrest him. PW5 testified that he did not know longur before and met him after his arrest. The Officers who arrested him recovered JOHN LOKIYOT'S documents from Longur.

PW6, PC MICAL KORIR, was attached at the Crime Branch Isiolo Police Station. He testified that he was the investigating Officer. On 19/10/2014 one MARTIN EPAKAN was brought to the station and he took him to the Crime Branch Office for further investigation. A search was conducted on the Appellant and in his wallet they found a copy of his I.D, a Military ID card for one JOHN ANYANGAI and a Co-op Bank ATM in the names of JOHN ANYANGAI. The appellant claimed that JOHN ANYANGAI had given him the documents. PW6 checked the records and found a report booked in the occurrence book on the theft of the ATM card and Military ID card by the complainant. He called John Anyangai who came and recorded a statement and told him that on 13/5/2014 he was attached by armed robbers and robbed of Ksh 17,000/=, Knapsack sprayer, water pump, Military ID card and Co-op Bank ATM card. JOHN was able to identify the Military I.D card and ATM card as belonging to him. PW6 charged the Appellant for the offence.

PW6 produced the Military I.D card and Co-op Bank ATM card as exhibits 1 and 2, the appellant's wallet and copy of his I.D card as exhibits 3 and 4 respectively. He further identified the appellant as the person brought to the station by AP Officers and from who the Military I.D and ATM cards were recovered from. He further testified that Ksh 500/=, mobile phone Tecno TSO and its charger, a belt and a hat that were recovered from the appellant were returned to him on 21/10/2014.

The appellant, Martin Epakan in his sworn defence testified that he stays in LMD and is a loader. On the day of his arrest he had left home at 9:00am and went to his sister's home until 11:30am. Thereafter he went to Isiolo town where he normally loads until 12:45pm then went to the Miraa Market where he met a friend who took him to a bar called Westgate. At the bar some AP Officers came and asked who was MARTIN AKA RASTA and he told them he was the one. He was then arrested and taken to Central AP camp. Thereafter, he was taken to Isiolo Police Station where a search was conducted and a Mobile phone and wallet which had Ksh 500/= was recovered. He was then booked in the O.B. He had a grudge with Halima. They had disagreed over cess money for sand.

He further testified that he does not know JOHN LOKOYOT, his wife and FATUMA. He confirmed that he met Halima who said that she was going to visit her parents in LMD.

The issue for determination is whether the prosecution proved each of the two counts and the alternative count the appellant was facing before the trial court. The count for robbery with violence involved an incident which took place on 31<sup>st</sup> May 2016. PW1 was the complainant. It is the evidence of PW1 and his wife PW2 that on 31/5/2014 they were robbed at gun point by two people. The appellant was arrested on 19/10/2016. This was after a period of over four and a half months. The prosecution evidence is to the effect that the appellant was found in possession of PW1's employment identity card and ATM Card. The defence evidence did not make any reference to those items. According to the appellant, he was found with his mobile phone, wallet and Ksh 500.

From the evidence on record, I do find that the appellant was indeed found in possession of PW1's employment ID card and ATM Card. The prosecution evidence sufficiently proves this fact. The two exhibits were produced. PW1 identified them to be his. The trial court did not rely on the doctrine of recent possession. The trial court simply concluded that since the appellant was found in possession of the ID and ATM cards of PW1, then he must have been the robber. The lapse of time definitely erodes that conclusion. The evidence of PW1 and PW2 that when they went to the police station they were shown the appellant who fitted the description of the robbers cannot amount to positive identification. According to the two witness, the two robbers were tall. The appellant was arrested for another offence and not that of robbery with violence. It was mere coincidence that he was found in possession of PW1's property when he was arrested.

From the evidence on record, I do find that the prosecution did not prove the main count of robbery with violence beyond reasonable doubt. I do however find that the prosecution did prove the alternative charge of handling stolen property contrary to section 322(1) of the penal code and the appellant is hereby convicted of that charge. It is clear from the evidence that the appellant was found in possession of the two identification documents. The appellant did not give any explanation as to how he came into possession of those items. Since the items can easily be moved from one person to another and taking into

account the period between the time of the offence on 31<sup>st</sup> May, 2014 and the time of arrest on 19<sup>th</sup> October, 2014, I do find that it would be imprudent to apply the doctrine of recent possession or find the appellant guilty of robbery with violence.

The next issue is the charge of house breaking and stealing. The evidence of PW3, Fatuma Mohamed, is that on 16/10/2014, she passed by PW4's home and saw someone at the gate with pliers and a hammer. She observed that the person had a marvin head gear and rastas. PW4 was informed of the breakage of her house. When PW3 described the physical appearance of the person she had seen at her gate, she recognized that description, she remembered that this was her mother's neighbor. PW4 had met the appellant on that very day when she was coming from her mother's place. The appellant's evidence that he had a dispute with PW4 over cess is nothing but wild allegations. PW4 testified and the appellant did not ask her about the cess dispute.

The evidence shows that upon being given the description of the person seen at her house, PW4 reported to the police and gave the appellant's name. The burglary PW4's house occurred on 16/10/2014. It is the report made by PW4 which led to the arrest of the appellant soon after PW3 saw the appellant at PW4'S home, PW4 was informed by her children that her house had been broken into. There is no doubt that it is the appellant who broke into PW4'S home. He was seen at that home holding pliers and a hammer. He was aware that PW4 had gone to her mother's place. It is the appellant who broke and stole from PW4's home.

Given the evidence on record, I do find that the charge of robbery with violence was not proved beyond reasonable doubt. The appeal on that count is hereby allowed. However, the appellant is found guilty of the offence of handling stolen property as charged in the alternative count. I do find that the prosecution did prove both the alternative count to robbery with violence as well as the second charge of house breaking and stealing. The trial court did not sentence the appellant on the second charge of house breaking and stealing. The death sentence is hereby set aside. The appellant is sentenced to serve eight (8) years imprisonment for the offence of handling stolen property. He is sentenced to serve four (4) years imprisonment for the second charge of house breaking. The two sentences shall run concurrently.

In the end, the appeal party succeeds. The death sentence is set aside. The appellant is hereby sentenced to serve eight (8) years imprisonment for handling stolen property and four years imprisonment for home breaking. The sentence to run concurrently.

**Dated and signed at Marsabit this.....day of December, 2017**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Meru this 18<sup>th</sup> Day of January,2018**

**A. MABEYA**

**JUDGE**